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| ISSUES RELATED TO THE STATE OF DISASTER FOR THE FEBRUARY 2021 WINTER WEATHER EVENT | § § § | PUBLIC UTILITY COMMISSION OF TEXAS |

**EXELON GENERATION COMPANY, LLC'S EXPEDITED MOTION FOR RELIEF AND REHEARING OF FEBRUARY 21 ORDER DIRECTING ERCOT TO TAKE ACTION AND GRANTING EXCEPTION TO ERCOT PROTOCOLS**

TO THE HONORABLE COMMISSIONERS:

Exelon Generation Company, LLC ("Exelon")[1] respectfully files this Expedited Motion for Relief and Rehearing ("Motion") of a discrete ruling contained in the Public Utility Commission of Texas ("Commission" or "PUCT") Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols issued on February 21, 2021 ("Order"). The Order was issued *sua sponte* and did not follow rulemaking, emergency rulemaking or contested case procedures under the Texas Administrative Procedure Act ("Administrative Procedure Act" or "APA").[2] Out of an abundance of caution and pursuant to APA § 2001.146 and Public Utility Commission of Texas ("Commission" or "PUCT") Procedural Rule § 22.264, Exelon submits this Motion to request expedited reconsideration of the aspect of the Order that granted ERCOT the right to deviate from existing protocol requirements related to default uplift invoices, and to preserve Exelon's rights to judicial review. No exigent circumstances justified this aspect of the Order, which grants ERCOT unbounded discretion to determine the amounts and the schedule for recovering default uplift payments from market participants. While this ruling appears limited and

[1] Exelon Generation Company, LLC, through subsidiaries, owns 3,620 MWs of gas-fired capacity and 87 MWs of wind power in Texas. Exelon's subsidiary, Constellation New Energy, Inc., also provided approximately 14 TWh of competitive retail supply to residential and commercial/industrial load in 2020. Exelon Generation Company, LLC also provides wholesale supply to a number of Texas cooperatives and municipalities.

[2] Tex. Gov't Code §§ 2001.001-.903.



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discrete, the discretion awarded to ERCOT will allow it to unilaterally determine how over *$3 billion* in short-pays will be recovered from the non-defaulting market participants left standing after the first round of defaults. In short, the order allows a free for all at precisely the time when the Commission should be conducting an open, public process, consistent with the APA and the Commission's own rules, to develop rules and procedures for addressing market defaults that carefully balance the interests of consumers, the future of the ERCOT market, and fundamental fairness to the market participants who have not defaulted on their obligations. In support thereof, Exelon would respectfully show as follows:

## ARGUMENT

On February 21, the Commission, on its own motion and without the opportunity for notice and comment, adopted an order "authorizing ERCOT to use its sole discretion in taking actions under the ERCOT Nodal Protocols ("ERCOT Protocols") to resolve financial obligations between a market participant and ERCOT." The authorized actions, among other items, gave ERCOT discretion to "deviate from protocol requirements regarding the maximum amount of default uplift invoices."[3] The maximum uplift charge permitted by the ERCOT Protocols is $2,500,000 per month,[4] an amount arrived at through ERCOT's lengthy protocol revision process, which was designed to protect market participants and consumers. Protocol 9.19.1 provides, in pertinent part:

> (4) Any uplifted short-paid amount greater than $2,500,000 must be scheduled so that no amount greater than $2,500,000 is charged on each set of Default Uplift Invoices until ERCOT uplifts the total short-paid amount. ERCOT must issue Default Uplift Invoices at least 30 days apart from each other.
>
> (5) ERCOT shall issue Default Uplift Invoices no earlier than 90 days following a short-pay of a Settlement Invoice on the date specified in the Settlement Calendar. The Invoice Recipient is

[3] Order Directing ERCOT To Take Action and Granting Exception to ERCOT Protocols (Feb. 21, 2021).
[4] ERCOT Protocols § 9.19.1.

> responsible for accessing the Invoice on the MIS Certified Area once posted by ERCOT.

Once default uplift invoices are issued, payments of default uplift invoices are due five business days after the invoice is received.[5] In the wake of the PUCT's repricing orders issued on February 15 and 16, which already have caused more than *$3 billion* in defaults by market participants as of March 11, 2021, with the final amounts yet to be determined, this aspect of the Order now threatens to drive even more participants out of the market, as they could now be made to bear enormous default uplift charges. With the maximum default uplift rule eliminated, ERCOT now has sole discretion to determine how and when to collect this massive default amount, and thereby to determine who will be able to stay in the market and who will become a subsequent defaulting party. The unfettered discretion that the Commission awarded ERCOT also complicates the already challenging task of managing cash flows going forward for those market participants that have not defaulted, as it is unclear how much notice ERCOT will provide to market participants about the change in rules. There is good cause for concern: ERCOT thus far has not been transparent with respect to short-pay and uplift expectations, which means that market participants have not known what percentage ERCOT will pay of the funds that they are owed while at the same time they are required to meet their payment obligations to ERCOT. In some instances, this has led to a need to secure additional cash in the overnight lending market. While thus far Exelon has been able to manage these challenges, there is absolutely no need for ERCOT to have unfettered discretion with respect to default uplift invoices, which would typically only begin to be collected 90 days after the short-pays occur.

Good cause to grant this Motion on an expedited basis exists in light of the imminent peril to the ERCOT market as a result of the extraordinary uplift, pending legislative efforts to address

[5] ERCOT Protocols § 9.19.2.1.

recent events at ERCOT, and a desire by some market participants to rush to the courthouse to individually exclude themselves from the impending uplift, thereby harming all other market participants with a greater potential share of uplift. The Order was not merely procedurally deficient; it stands to cause irreparable harm to market participants who will be affected by the imposition of enormous uplift charges. We have already seen the impact of the Commission's administrative pricing Orders of February 15 and 16, with an electric cooperative, retail providers and others defaulting on large obligations to ERCOT.[6] Now, with the uplift cap eliminated, those defaults imminently threaten to cause severe financial hardship, insolvency, business disruptions, restricted access to capital markets, credit rating downgrades, loss of goodwill and, for some, potentially bankruptcy, which has downstream negative impacts on the non-defaulting market participants.[7] Those left standing face the imminent risk that they will have no adequate remedy at law as their defaulting commercial counterparties become insolvent.[8] The Commission's March 12, 2021 order extending the ERCOT dispute filing deadline for settlement/resettlement statements for operating days February 12–19, which would otherwise be required within 10 business days, for an additional six months, simply adds to the imperative that ERCOT not collect default uplift in accordance with its own discretionary schedule.[9] Exelon, accordingly, urges the Commission to rescind this aspect of its order on an expedited basis, and open a rulemaking and/or evidentiary proceeding so that the uplift problem can be addressed by the Commission in due

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[6] ERCOT Market Notice, W-B022621-01 (Feb. 26, 2021).

[7] *See generally Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.], 2011); *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 364 (Tex. App.—Houston [1st Dist.], 2011); *Home Sav. of Am., F.A. v. Van Cleave Dev. Co.*, 737 S.W.2d 58, 59 (Tex. App.—San Antonio, 1987); *Digital Generation, Inc. v. Boring*, 869 F. Supp. 2d 761, 781 (N.D. Tex. 2012) (irreparable harm may be demonstrated by potential bankruptcy, business disruptions and by loss of goodwill, reputation, and credit rating).

[8] *See Texas Black Iron, Inc. v. Arawak Energy Int'l Ltd.*, 527 S.W.3d 579, 587 (Tex. App.—Houston [14th Dist], 2017) (a plaintiff does not have an adequate remedy at law if the defendant faces insolvency or becoming judgment proof before trial).

[9] ERCOT Protocols § 9.14.2(3).

course, in substantial compliance with its rules, and upon a reasoned agency record. Exelon also files this Motion to preserve its right to judicial review of the Commission's action.

## LEGAL ANALYSIS AND POINTS OF ERROR

The Commission's February 21 Order imposed new default uplift obligations on market participants without any opportunity for public comment, hearing, or presentation of evidence or argument. The Order was issued pursuant to the Commission's claimed authority under Texas Public Utility Regulatory Act[10] ("PURA") § 39.151(d). As described below, the Order was issued through an unlawful procedure in excess of the Commission's statutory authority; did not substantially comply with the Administrative Procedure Act; violated affected parties' due process rights; and the decision that it reached was not in substantial compliance with the APA or supported by any evidence.

### A. Point of Error 1: The Order Was Made Through Unlawful Procedure Because It Was Not Adopted Under Any Process Described in the Administrative Procedure Act or PURA.

Under the Texas Administrative Procedure Act, state agencies are charged with providing an opportunity for public participation in the rulemaking process and providing an opportunity for hearing and participation in any contested case proceeding that determines the legal rights, duties or privileges of a party.[11] PURA § 39.003 confirms the scope of the Commission's authority to act within the competitive power market, stating: "Unless specifically provided otherwise, each commission proceeding under [Chapter 39 of PURA], other than a rulemaking proceeding, report, notification, or registration, shall be conducted as a contested case."[12]

[10] Tex. Util. Code §§ 11.001-66.016 (West 2019).
[11] *See* Tex. Gov't Code §§ 2001.001, 2001.0003(1), 2001.029, 2001.051.
[12] Tex. Util. Code § 39.003.

With respect to the operation of the competitive market, PURA § 39.151(d) directs the Commission to "adopt and enforce rules relating the reliability of the regional electric network and accounting for the production and delivery of electricity among generators and all other market participants."[13] The Commission "may delegate to an independent organization responsibilities for establishing or enforcing such rules."[14] Rules adopted and enforcement actions taken by the independent organization are subject to Commission oversight and review.[15]

The Order was issued through an unlawful procedure that exceeds the Commission's statutory authority because, as explained further below, the Order revised the ERCOT Protocols, which have the force of agency rules, and determined the legal rights of market participants without complying with either rulemaking or contested case procedures. As such, the Order is unlawful, exceeds the Commission's statutory authority, and should be reconsidered by the Commission, in whole or in part, on that basis.

### B. Point of Error 2: The Commission Failed to Substantially Comply with the Administrative Procedure Act's Rulemaking Procedures and Violated its Own Procedural Rules With Respect to Rulemaking

The ERCOT Protocols have the force and effect of administrative rules adopted by a state agency.[16] As such, the Order may properly be characterized as amending or modifying existing administrative rules. In particular, it modified the ERCOT Protocols by permitting ERCOT to "[d]eviate from protocol requirements regarding the maximum amount of default uplift invoices," which allowed ERCOT to bypass the nodal protocol revision process.

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[13] *Id.* at § 39.151(d).
[14] *Id.*
[15] *Id*
[16] *See PUCT v. Constellation Energy Commodities Grp.*, 351 S.W.3d 588, 595 (Tex. App.—Austin, 2011).

The Commission must adopt any new administrative rules, as well as amendments to existing rules, pursuant to the rulemaking processes set forth in the APA and the Commission's Procedural Rules.[17] The Commission may initiate a rulemaking on its own motion by publishing notice of the proposed rule in accordance with the APA, which requires that public notice be provided at least 30 days prior to adopting the proposed rule and that the proposed rule be filed with the Secretary of State for publication in the *Texas Register*.[18] The Commission must afford all interested persons a reasonable opportunity to submit data, views and arguments in the form of written comments on the rule, and must grant a public hearing if requested by 25 persons, a governmental subdivision or agency, or an association with at least 25 members.[19]

A rule is voidable unless a state agency adopts it in substantial compliance with the procedures described above.[20] The ERCOT Protocol changes directed by the Order do not meet this substantial compliance standard. Market participants received no notice of the proposed rule revisions and had no opportunity to submit written comments or participate in a public hearing on their adoption. As a result, the rule changes directed by the Order were not adopted in substantial compliance with the Administrative Procedure Act.

The lack of clear process also disrupts market participants' rights to obtain judicial review. For PUCT rule changes, the normal appellate process is to bring a declaratory judgment action asking a court to determine "the validity or applicability of a rule, including an emergency rule" adopted pursuant to the APA.[21] PURA § 39.001(f) further prescribes: "[a] person who challenges the validity of a competition rule must file a notice of appeal with the court of appeals and serve

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[17] *See generally* APA Subchapter B, *Rulemaking*; *see also* Tex. Gov't Code § 2001.003(6) (defining "rule" as including "the amendment or repeal of a prior rule").
[18] Tex. Gov't Code § 2001.023; 16 Tex. Admin. Code §§ 22.281(b), 22.282(b).
[19] Tex. Gov't Code § 2001.029; 16 Tex. Admin. Code § 22.282(c),(d).
[20] *See* Tex. Gov't Code § 2001.035 ("A rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.34.").
[21] Tex. Gov't Code § 2001.038.

the notice on the commission not later than the 15th day after the date on which the rule as adopted is published in the Texas Register." In the face of an agency order that failed to clearly follow either rulemaking or contested case procedures, it is imperative that the Commission reconsider the Order in light of the impending disastrous consequences thereof.

Finally, Exelon notes that the Commission's responsibility to follow the rulemaking procedures of the Administrative Procedure Act and its own Procedural Rules is in no way limited by its separate responsibility to conduct oversight of ERCOT's business operations. The Order states that the Commission has "'complete authority' over ERCOT," citing PURA § 39.151. In context, that provision of PURA gives the Commission "complete authority to oversee and investigate [ERCOT's] finances, budget and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties."[22] This general duty to oversee ERCOT's administrative operations is distinct from the Commission's power to delegate its rulemaking authority to ERCOT and to then review and revise those rules, which powers are separately addressed in the same provision of PURA.[23] Nor would it be sensible to conclude that the Commission can avoid the state's administrative rulemaking process altogether by delegating its rulemaking authority to ERCOT and thereafter altering any ERCOT rule, by any method it chooses, at any time, as an exercise of its "complete authority."[24]

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[22] Tex. Gov't Code § 39.151(d).

[23] *Id.*

[24] Nor does the Commission's Substantive Rule § 25.501 or Procedural Rule § 22.5 authorize any ad-hoc adoption of new administrative rules outside of the process mandated by the APA. The Texas Supreme Court has held that an administrative agency cannot adopt rules permitting it to stray from the minimum requirements of the APA. *Mosley v. Texas Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 261 (Tex. 2019) ("Whatever an agency's authority is under [APA § 2001.004, *Requirement to Adopt Rules of Practice*], it cannot extend to contravening the APA's express requirements. The APA's purpose is to 'provide minimum standards of uniform practice and procedure for state agencies.' *Id.* § 2001.001(1). It would be self-defeating for the APA to allow an agency to use the rulemaking process to sidestep its requirements.").

### C. Point of Error 3: The Commission Failed to Substantially Comply with the Administrative Procedure Act's Emergency Rulemaking Procedures and Violated its Own Procedural Rules With Respect to Emergency Rulemaking.

The Commission can bypass the prior notice and comment requirements of APA §§ 2001.023 and 2001.029 by adopting an emergency rule pursuant to APA § 2001.034 and PUCT Procedural Rule § 22.283, which require only that (1) the rule's preamble include a finding that "an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice" and stating a reason for that finding, and (2) the emergency rule and written reasons for its adoption be provided to the office of the Secretary of State for publication in the *Texas Register*.[25] However, the Order did not contain the required finding to support the adoption of an emergency rule, and there has been no publication thereof in the *Texas Register*.

Moreover, these failures were not mere technical defects or oversight in drafting; it is clear that the rule change effected by the Order was not required to prevent any immediate peril to public health, safety or welfare. Given ERCOT's existing restriction on issuing a default uplift invoice any earlier than 90 days following a short-pay of a Settlement Invoice,[26] there is clearly time to allow for reasoned consideration of the appropriate path. The schedule and caps that ERCOT adopts with respect to the default uplift invoices have the potential to greatly exacerbate the crisis. Further cascading defaults are not in the public interest. It is prudent and consistent with the public interest for ERCOT and the PUCT to stop, reassess the state of the market, and consult with the remaining market participants concerning what those entities can bear. Then and only then, should ERCOT move forward with collections in accordance with a schedule that allows for planning, and in amounts that are likely to minimize the risk of additional defaults. The previous rules gave

[25] Tex. Gov't Code § 2001.034; 16 Tex. Admin. Code § 22.283.
[26] ERCOT Protocols § 9.19.1(5).

market participants certainty as to the schedule of default uplift invoices, and more importantly, that the amounts of such invoices could be borne by market participants without significant disruption. Any change to the rules should be designed to achieve the same goals, recognizing that these are not normal times.

### D. Point of Error 4: The Commission Violated APA § 2001.051 and its Own Procedural Rules With Respect to Contested Cases, Acted in Excess of Its Statutory Authority, and Followed an Unlawful Procedure

A state agency may also issue a final order affecting the rights of parties in a contested case proceeding conducted in accordance with the APA. Nonetheless, the Commission's issuance of the Order was not preceded by any of the primary features of a contested case; there has been no opportunity for interested parties to participate in a hearing or to respond and present evidence and argument, each of which are required under APA § 2001.051. No factual record was developed to support the decisions made in the Order. Nor did the Order contain the required elements of a final order in a contested case, as it does not include "findings of fact and conclusions of law, separately stated."[27] Nor did the Order issue in a Commission docket styled as a contested case, but rather it was filed in a "project" docket with the caption, "Issues Related to the State of Disaster for the February 2021 Winter Weather Event." As such, the Commission violated APA § 2001.151 by issuing an order affecting Exelon's and others' rights without providing the right to participate in a hearing or present evidence and argument, and in doing so the Commission exceeded its statutory authority as a state agency and instead followed an unlawful procedure when it issued the Order.

We note that the Commission's Procedural Rules set out a specific contested-case process that may be used to review ERCOT's rules and conduct. Procedural Rule § 22.251 permits the filing of a complaint regarding ERCOT's conduct, including its promulgation of any "procedures

[27] Tex. Gov't Code § 2001.141 (b); 16 Tex. Admin. Code § 22.263(2).

. . . accounting for the production and delivery of electricity among generators and other market participants," which process may be initiated by Commission staff.[28] Thus, a contested case could have been initiated under Procedural Rule § 22.251. This would have allowed interested parties to participate in review of ERCOT's default uplift process and to develop a record of evidence supporting any revised rule. Procedural Rule § 22.251 also permits the Commission to suspend the operation of any ERCOT rule that is the subject of review and to expedite the contested proceeding, each following a showing of good cause.[29] Despite the availability of these processes, the Commission afforded interested parties no right to participate in the decision to alter critical features of the ERCOT Protocols and now leaves them with great uncertainty as to how they may seek judicial review.

### E. Point of Error 5: The Commission Did Not Act Within the Authority Granted by the Governor's Emergency Proclamation

The Governor's February 12 emergency proclamation permitted the suspension of "any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster," but only provided for such a suspension "upon written approval of the Office of the Governor."[30] There is no record evidence or other indication that Commission requested or obtained written approval of the Governor to suspend the normal operation of the Administrative Procedure Act before issuing the Order and fundamentally altering the ERCOT Protocols. Thus, it is clear that the Governor's proclamation does not grant the Commission any additional authority or affect any analysis as to whether the Commission adopted new ERCOT Protocols in substantial

[28] 16 Tex. Admin. Code § 22.251(b),(c).
[29] *See id.* at § 22.251(i),(k).
[30] Disaster Proclamation of Gov. Greg Abbott dated Feb. 12, 2021.

compliance with the APA, or whether it acted in violation of PURA or the APA or otherwise in excess of its authority when it issued the Order.

### F. Point of Error 6: The Order Violates the Due Process Rights of ERCOT Market Participants, Who Have a Right to Comment and Hearing, or at a Minimum, to Judicial Review

As explained above, the Commission did not follow the procedures set forth in the Administrative Procedure Act in issuing the Order. Generators, retail electric providers, marketers and cooperatives who may ultimately be driven from the ERCOT market by the Commission's default uplift decision had no opportunity to comment on that decision, no opportunity for a hearing, and no opportunity to present evidence or arguments. In addition, the right of affected parties to seek judicial review of the Commission's Order has been fundamentally jeopardized because the Commission has neither clearly issued a final, appealable order nor has it properly promulgated a new rule, leaving parties to guess what process they can follow to obtain review of the Commission's actions.

Procedural due process "at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner" before a person can be deprived of a vested property interest.[31] Property interests protected by due process include, at the very least, ownership of money.[32] By denying Exelon and others the opportunity to provide written comments or arguments prior to issuing the Order, and by now impairing their right to judicial review in acting outside of any authorized procedure, the Commission has violated those parties' right to procedural due process. The Order also violates the substantive due-course-of-law protection provided in Article I, Section 19 of the Texas Constitution because its effects are so burdensome as to be oppressive in

[31] *Mosley v. Texas Health & Hum. Servs Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019) (internal quotation omitted).
[32] *Matzen v. McLane*, 604 S.W.3d 91, 113 (Tex. App.—Austin, 2020).

light of the governmental interest served.[33] The financial stability of the ERCOT market can be ensured by a variety of more equitable methods, including spreading uplifts out over time and obtaining securitization financing, so it is clearly oppressive to force market participants to bear enormous short-term uplift charges that could force them into bankruptcy or severe financial distress due to the defaults of others. It is imperative that the Commission reconsider its Order and provide affected market participants a clear pathway to judicial review. Moreover, we ask that the Commission initiate a rulemaking process or contested case and consider interested parties' comments and arguments with respect to the ERCOT Protocol revisions described in the Order. The Commission and the ERCOT market as a whole will benefit from carefully considering all options and crafting a solution that will provide fair outcomes for all market participants and consumers.

## CONCLUSION

It is imperative that the Commission reconsider its decision to allow ERCOT to impose an unlimited amount of default uplift pursuant to a schedule determined in its unfettered discretion. Considering the unprecedented defaults reported by ERCOT, the maximum amount of monthly default uplift is a policy decision that will have broad impacts on the market. As such, it should not be arrived at in private conversations at ERCOT, but instead should be considered by the Commission in an open, public process, consistent with the APA and the Commission's own rules. It is not in the public interest to delegate to ERCOT a decision that could cause further cascading defaults, force generators and load-serving entities out of the market, and ultimately increase costs to consumers. Again, the absence of any reasoned explanation for the decision to give ERCOT such discretion and the lack of any agency comment or evidentiary record show that the

[33] *See Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015).

Commission's decision to lift the maximum default uplift charge was not reasonably supported by evidence and should be reconsidered.

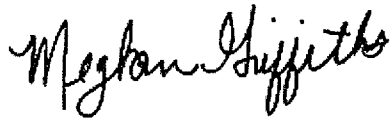
For the foregoing reasons, Exelon respectfully requests that the Commission grant the following relief:

> (1) Issue an order rescinding ERCOT's ability to waive standard uplift protocols, including the $2.5 million limit, and open a project and rulemaking to address this issue.
>
> (2) Open a rulemaking and/or evidentiary proceeding to consider matters related the uplift.

Exelon also requests all other relief to which it may be entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.



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**CERTIFICATE OF SERVICE**

I certify that notice of the filing of this document was provided to all parties of record via electronic mail on March 18, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

*/s/ Jennifer Ferri*
Jennifer Ferri